IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 05-CV-329-TCK-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR RECONSIDERATION OF THE COURT'S ORDER REGARDING THE STATE'S PRIVILEGE LOGS [DKT. #1486]

Comes now the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and respectfully submits this as its reply in further support of its Motion for Reconsideration of the Court's order regarding the State's privilege logs. [DKT #1486].

I. Introduction.

Peterson Farms' (Peterson) response [DKT #1553] to the State's motion merely repeats the Court's errors which the State, respectfully, submits are the basis for reconsideration and reversal of the Court's Order. The State will treat each point of the response in turn.

II. Argument.

A. This is federal court discovery, not a state Open Records Act proceeding.

Peterson misstates the State's argument, claiming that the State asserts the "Court applied solely the ORA." The State recognized that the Court had not based its analytical solution "on privilege law alone, but on the provisions of the Oklahoma Open Records Act . . . ," which

accurately recounts the substance of the Order. In the Order the Court found that Oklahoma law reflects a public policy expressing the strong presumption that the records of the State should be open through its ORA, and the State had the burden of establishing exceptions to the applicability of the Act. Order, p. 3. The Court also found the State's privilege log (which complies with the requirements of Local Rule 26.4[1]) was insufficient to determine if a communication falls "within the stated exceptions," presumably meaning the exceptions to both the ORA and 12 Okla.Stat. § 2502(D) (7). Clearly, contrary to the teaching of the Tenth Circuit in *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1369 (10th Cir. 1997), to accommodate the conflicting policies embodied in the state and federal privilege law, the Court took the ORA into account in determining that state, rather than federal, privilege law applied.

B. Nothing about this case distinguishes it from all other cases applying the federal common law of nuisance to federal question cases with pendant state claims.

The Court's analytical solution rests, in part, upon the provisions of the ORA and the fact that, in the Court's view, "state law claims are of equal importance to the federal claims raised" in this federal question case. Order, p. 2. Next, the Court stated the claims raised must be reviewed "in relation to the interest for which protection is sought rather than a numerical count of federal versus state based claims," finding the State's interest is strong as evidenced by the filing of this action by the Oklahoma Attorney General. Order, p. 2. However, the interests for which protection is sought by state or federal claims are not distinctly different, being an injunction or abatement of further pollution, and remediation and restoration of injured resources, compensation to the State for harm caused to its resources, as well as for the unjust enrichment of Defendants resulting from their improper waste disposal practices. Nothing about

[1] The fact that Local Civ. R. 26.4 does not require the information required by the Order only serves to emphasize how unprecedented the requirements of the Order are.

those claims, or about the fact the State is seeking to stop the pollution, have the pollution cleaned up, and be compensated for harm caused by the pollution, distinguishes this case from every other case cited in which the federal common law of privilege has been applied to federal question cases in which pendant state law claims are filed.[2] Just as any other litigant similarly situated, the State should have the benefit of federal privilege law in this case.

Additionally, Peterson's response is disingenuous about both the mischief that application of the Order will have by chilling attorney client communication in the present case, based upon the knowledge that such communications will be subject to the Court's review, and by continued assaults on the State's attorney-client privilege as this case goes forward. Chilling communications, and the burden of defending the State's privilege, constitute manifest injustices which the State should not have to suffer.

C. Once the privilege attaches to a document, the privilege remains permanently.

Peterson failed to respond to the State's invocation of long-standing law that materials subject to the attorney client privilege are permanently protected from disclosure, except when the privilege is waived, *see, e.g., Lewis v. Unum Corporation Severance Plan*, 203 F.R.D. 615, 618 (D. Kan. 2001), and that the privilege continues even after the relationship has been terminated. *See, e.g., Chandler v. Denton*, 741 P.2d 855, 865 (Okla. 1987). Thus, Peterson offers no support for the Court's unprecedented holding that based upon state privilege law, the privilege exists only while an investigation, claim or action is pending, and that the privilege is removed once the investigation, claim, or action has been terminated. Loss of privileges, valid

[2] Any reliance upon *White v. American Airlines, Inc.*, 915 F.2d 14114 (10th Cir. 1990) would be misplaced, because *White* involved only a state cause of action.

even under state law, once the claim, investigation or action is over is a manifest injustice which the State should not have to suffer.

D. Only an *in camera* review will protect the State's privileged documents.

Peterson's response contemplates litigation of privilege issues in open court, rather than an *in camera* review by the Court. Response, p. 8. The Court apparently assumes that the wholesale removal of attorney-client privilege and work product protection in the Order will render the State's request for *in camera* review moot. Order, pp. 4-5. However, especially since Peterson has not justified access even to the documents listed on its exhibit of work product challenges, only an *in camera* review by the Court prior to release of the challenged documents can adequately protect the State's interests.

E. Neither Peterson nor the Order properly analyzes the work product issues.

Peterson continues the error in the Order in the application of Fed. R. Civ. P. 26(b)(3) and (4). Both Peterson and the Order avoid the actual text of the pertinent rules by relying on expressions like "special need" and "the documents are not available from any other source." Order, p. 4. Properly read, it is clear that Peterson has not established, on a document by document basis, a "substantial need" for the State's work product to prepare its case and that it cannot, without undue hardship, obtain their "substantial equivalent by other means" as required by Rule 26(b)(3) and (4).

Peterson relies on the simplistic truism that because "there is no other means of obtaining these documents," Response, p. 10, it cannot get "these documents" unless the Court orders their production, ignoring the actual requirement of the rule that it must demonstrate not that it cannot get "these documents," but rather that it cannot get the "substantial equivalent" of the information contained in them by other means. Likewise, the Court focused on the fact that "the documents"

were not available from any other source. Order, p. 4. The Rule focuses, not upon the particular documents, but their "substantial equivalent." Neither the Court nor Petersons has taken account of Peterson's ability to get the substantial equivalent of the facts in the State's work product by other means, such as interrogatories or depositions. *See Jinks-Unstead v. England,* 232 F.R.D. 142, 147 (D.D.C. 2005). Thus, no showing whatsoever has been made that there is no way to get the substantial equivalent of the contents of the State's work product, without undue hardship, or that it is impracticable to obtain the facts or opinions of experts on the same subject by other means. Rule 26(b)(4)(B)(ii).

Indeed, the attachments to Peterson's Response demonstrate that Peterson, and the other Defendants, have ample information from the State's extensive discovery to develop their purported defenses. Peterson attached a number of documents pertaining to the Sequoyah Fuels Corporation's use of "treated raffinate," a byproduct of uranium production touted as a fertilizer, at its location at the lower and southern end of the IRW. The attached information includes a report of a toxicologist and various technical reports about the use and contents of this "raffinate." Clearly, if this information is at all relevant -- which the State denies -- it is more than adequate for Peterson to use to prepare its case. The State provided similar documentation on the other areas of Peterson's interest which likewise will assist it in attempting to make its case.

Finally, Peterson has not made any showing that the Court has adequately protected the "mental impressions, conclusions, opinions, or legal theories" of State's counsel, as required by Rule 26(b)(3) (B). Both the Order and Peterson's response are entirely silent about this requirement of the Rules, and make no provision whatsoever to protect these vital interests of the

State. Consequently, the Court should reconsider its order and reverse its requirement that the State produce wholesale its work product materials.

III. Conclusion

The State's Motion for Reconsideration should be granted in its entirety.

Respectfully Submitted,

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